

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
ROHEL PASCUAL)	File No. 20010430AAB
)	
For Renewal of License for Broadband Radio Service)	
Station WHT593, Aquadilla, Puerto Rico)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 2007

Released: January 25, 2007

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

On November 30, 2004, Rohel Pascual (Pascual) filed an amendment¹ to an application² for renewal for Broadband Radio Service³ (BRS) Station WHT593. In submitting this amendment, Pascual requested a waiver of Section 21.19 of the Federal Communication Commission's (Commission's) Rules regarding the timing of filing a BRS renewal application. On September 2, 2005, WHTV Broadcasting Corporation (WHTV) filed a Petition to Deny⁴ the Renewal Application. Pascual then filed an Opposition⁵ to WHTV's Petition to Deny. For the reasons set forth below, we grant Pascual's Waiver Request, dismiss WHTV's Petition to Deny for failure to establish standing, and direct processing of the Renewal Application.

II. BACKGROUND

1. On August 22, 1996, Pascual was issued a license for Station WHT593, with an expiration date of May 1, 2001.⁶ Under the rules in effect in 2001, BRS licensees were required to file their renewal applications between thirty and sixty days prior to the license expiration date.⁷ On April 30,

¹ Renewal Application, Request for Waiver of Renewal Filing Window (Waiver Request).

² File No. 20010430AAB (Renewal Application).

³ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Because the new rules have taken effect, we will refer to MDS by its new name.

⁴ Petition to Deny, WHTV Broadcasting Corporation (Sept. 2, 2005) (Petition to Deny).

⁵ Opposition to Petition to Deny, Rohel Pascual (Sept. 30, 2005) (Opposition).

⁶ File No. BLMD-9651380.

⁷ *See* 47 C.F.R. § 21.11(c) (2001).

2001, prior to the license expiration date but past the deadline for filing a renewal application, Pascual filed the Renewal Application.⁸ Pascual states the Renewal Application was not timely filed because he suffered a stroke around the time it was due.⁹ The stroke made Pascual unable to ensure the Renewal Application was filed in a timely manner.¹⁰

2. On November 19, 2004, the Wireless Telecommunications Bureau returned the Renewal Application and directed Pascual to amend the Renewal Application and request a waiver of Section 21.19 of the Commission's Rules.¹¹ On November 30, 2004, Pascual amended the Renewal Application and submitted the Waiver Request.¹² In addition to noting that the Renewal Application was not timely filed because of his stroke, Pascual points out that the Renewal Application was filed prior to the expiration of the license for Station WHT593.¹³ Pascual also notes he has hired counsel to ensure timely filings with the Commission in the future.¹⁴ On August 3, 2005, the Wireless Telecommunications Bureau accepted for filing the Renewal Application, as amended.¹⁵

3. On September 2, 2005, WHTV filed the Petition to Deny.¹⁶ WHTV objects to the Waiver Request and the renewal of the license for Station WHT593 claiming that the facilities have not been operational and that Pascual has intentionally misrepresented the operational status of the facilities.¹⁷ WHTV requests the authorization to construct Station WHT593 be terminated and the Renewal Application be dismissed as moot based on these allegations.¹⁸ Pascual requested an extension of time in order to file his opposition to the Petition to Deny on September 16, 2005 and filed an Opposition to the Petition to Deny on September 30, 2005.¹⁹ Pascual contends that the Petition to Deny is untimely and WHTV does not have standing.²⁰ Pascual also claims that the station was operational until June of 2005 and that the claims of untruthfulness are false.²¹

⁸ Renewal Application.

⁹ Waiver Request.

¹⁰ *Id.*

¹¹ Letter from the Federal Communications Commission, Wireless Telecommunications Bureau to Rohel Pascual, Ref. No. 3092578 (Nov. 19, 2004) (Return Letter).

¹² Waiver Request.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Wireless Telecommunications Bureau Market-Based Applications Accepted for Filing, Report No. 2219, *Public Notice* (Aug. 3, 2005) at 1.

¹⁶ Petition to Deny.

¹⁷ Petition to Deny.

¹⁸ *Id.*

¹⁹ Request for Extension of Time, Rohel Pascual (Sep. 16, 2005) (Extension); Opposition. Pascual requested the extension because his counsel was assisting family and friends relocated to the Washington area because of Hurricane Katrina. We find good cause for the extension and grant Pascual's request.

²⁰ Opposition at 2-3.

²¹ Opposition at 4-5.

III. DISCUSSION

A. Waiver Request

4. Under the Commission's Rules at this time, BRS licensees were required to file their renewal applications between thirty and sixty days prior to the license expiration date.²² Under former Section 21.19 of the Commission's Rules, a waiver will not be granted except upon an affirmative showing that:

(a) The underlying purpose of the rule would not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or

(b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applications must also show the lack of a reasonable alternative.

In addition, a request for waiver must contain a statement of reasons sufficient to justify a waiver.²³

5. Although Pascual filed his application thirty days late, he still filed his application prior to the expiration of Station WHT593's license period. Accordingly, while we do not condone Pascual's failure to file a timely renewal application, we conclude that his late filing did not unduly disrupt consideration of his qualifications to remain the licensee of Station WHT593.²⁴ Furthermore, Pascual had a stroke during the period the renewal was due.²⁵ This significantly impeded his ability to ensure that the Renewal Application was filed promptly. We find that this unique circumstance is a compelling justification for granting a waiver. Finally, we note that Pascual has taken steps to ensure that he complies with the Commission's Rules in the future.²⁶ Specifically, Pascual has hired outside counsel to ensure that he adheres to the Commission's procedural obligations.²⁷ Under these circumstances, we conclude that a waiver is justified under the second prong of the waiver standard.

B. Petition to Deny

6. Pascual contends that the Petition to Deny should be dismissed as untimely because the Renewal Application was originally accepted for filing on July 3, 2001.²⁸ We disagree. Because Pascual amended his application in 2004 to request a rule waiver, it was appropriate to place the amended application on public notice as accepted for filing. WHTV filed its Petition to Deny within thirty days after the amended application was accepted for filing. Accordingly, we conclude that the Petition to Deny was timely filed.

²² See 47 C.F.R. § 21.11(c) (2004).

²³ *Id.* The waiver standard under Section 21.19 is the same as the standard set forth under Section 1.925(b)(3), which applies to BRS licensees as of January 10, 2005. 47 C.F.R. §§ 1.925(b)(3), 21.19.

²⁴ See Jonsson Communications Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 22697 (WTB PSPWD 2002).

²⁵ Waiver Request.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Opposition at 2.

7. However, we agree with Pascual that WHTV has failed to establish standing to file a petition to deny. WHTV states that it leases a station that operates on the same channel as Station WHT593 and that it operates a video and data system in San Juan.²⁹ WHTV's allegation that it uses a co-channel station is insufficient to establish standing. In order to establish standing based upon co-channel operation, WHTV must show "significant service area overlap" with Pascual's station such that "it is conceivable" that WHTV and Pascual would be operating in the same territory.³⁰ In this case, the reference coordinates for the two licenses are approximately 70 miles apart.³¹ Since EBS stations have geographic service areas (GSAs) with a 35-mile radius,³² there is no meaningful overlap between the GSAs of Pascual and WHTV's lessor. Furthermore, WHTV has made no showing that it has any interest in the market served by Pascual's station or that Pascual's station has any impact on its operations. We therefore dismiss the Petition to Deny for failure to establish standing.

8. Even if we considered the merits of the Petition to Deny, we would deny it because the record as a whole fails to establish that Station WHT653 was in violation of Section 21.44(a)(3) or Section 21.303(d) of the Commission's Rules. Section 21.44(a)(3) of the Commission's Rules stated that a license would be automatically forfeited if the facilities are altered or the equipment is voluntarily removed and the station remains non-operational for thirty days or more.³³ WHTV argues that the affidavit by Ivan A. Feliu (Feliu), a tower technician, clearly establishes their contention that WHT593 had been deconstructed and not operational for more than thirty days.³⁴ Feliu's affidavit, however, merely states that the tower has not been in operation for two years, not that the facilities had been altered or that the equipment was voluntarily removed.³⁵ Moreover, Pascual has provided billing invoices for the use of the tower and for electricity consumed by Station WHT593 during the period that WHTV claims the station was deconstructed.³⁶ Along with the invoices, Pascual offers an affidavit from Mr. Leo Thomasian (Thomasian), the president of Caribbean Wireless System and the lessee of WHT593,³⁷ stating that Station WHT593 was operational until June 6, 2005.³⁸

²⁹ Petition at 1 n.1.

³⁰ AMTS Consortium, LLC, *Order*, 20 FCC Rcd 17975, 17976 ¶ 4 (WTB PSCID 2005); Mobex Network Services, LLC, *Order*, 18 FCC Rcd 12309, 12311 ¶ 6 (WTB PSPWD 2003); see also Mobex Network Services, LLC, *Order*, 18 FCC Rcd 12305, 12307 ¶ 5 (WTB PSPWD 2003).

³¹ The reference coordinates for Station WHT653 are 18°-18'-58.8" North Latitude, 67°-10'-40.7" West Longitude. The reference coordinates for Station WHT654 are 18°-16'-43.8" North Latitude, 66°-06'-36.6" West Longitude.

³² 47 C.F.R. § 27.1206(a)(1).

³³ 47 C.F.R. 21.44(a)(3) (2004). On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transformed the rules governing the Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O*). Among other actions, the *BRS/EBS R&O* eliminated the discontinuance of service rules for the new BRS and EBS. See *BRS/EBS R&O*, 19 FCC Rcd at 14255-57 ¶¶ 231-239. Because WHTV alleges that Station WHT653 was off the air for more than one year prior to January 10, 2005, however, WHTV alleges a violation of the rules that could lead to license cancellation.

³⁴ Petition to Deny, Exhibit 2.

³⁵ See *id.*

³⁶ See Opposition, Invoices for Use of Tower and Electricity (Sep. 30, 2005).

³⁷ See Opposition, Affidavit of Leo Thomasian (Sep. 30, 2005).

³⁸ *Id.* The admitted discontinuance of service in June of 2005 was not a violation of the Commission's Rules because Sections 21.44 and 21.303 of the Commission's Rules had been eliminated in January 2005. See *BRS/EBS* (continued....)

9. WHTV also argues that Pascual is in violation of former Section 21.303(d) of the Commission's Rules. This section stated:

[i]f any radio frequency should not be used to render services as authorized during a consecutive period of twelve months at any time after construction is completed and a certification of completion of construction has been filed,...the licensee shall, within thirty days of the end of such period of nonuse: (1) Submit for cancellation of the station license (or licenses) to the Commission at Washington, DC 20554; (2) File an application for modification of the license to delete the unused frequency (or frequencies); or (3) Request waiver of this rule....³⁹

WHTV claims that the affidavit by Feliu establishes that WHT593 has not been in operation for over two years.⁴⁰ However, Pascual has provided invoices for tower rental and electricity usage for Station WHT593 during the same period that Feliu claims the station was not in operation.⁴¹ Pascual also provides an affidavit from Thomasian stating that the station was in operation until June 6, 2005.⁴² In particular, the invoices for electricity usage weigh toward establishing that Station WHT593 was operational during the period in question. Therefore, we cannot find that Station WHT593 was non-operational in a manner that violates Section 21.303(d) of the Commission's Rules. Furthermore, since WHTV has failed to establish that the stations had permanently discontinued operation, it also failed to establish that Pascual misrepresented facts or lacked candor in his Waiver Request.

IV. CONCLUSION AND ORDERING CLAUSES

10. In conclusion, we grant Pascual's Waiver Request because the unique circumstances surrounding the request warrant it. We dismiss the Petition to Deny for failure to establish standing.

11. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 21.19 and 21.44 of the Commission's Rules, 47 C.F.R. §§ 21.19, 21.44, that the waiver request filed by Rohel Pascual (File No. 20010430AAB) on November 30, 2004 IS GRANTED.

12. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, that the Petition to Deny filed by WHTV Broadcasting Corporation on September 2, 2005 IS DISMISSED.

13. IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, that the Request for Extension of Time filed by Rohel Pascual on September 16, 2005 IS GRANTED.

(...continued from previous page)

R&O. We note that Pascual, like all other BRS and EBS licensees, will be required to demonstrate substantial service of Station WHT593 by May 1, 2011 or risk license forfeiture. *See* 47 C.F.R. § 27.14(e).

³⁹ 47 C.F.R. 21.303(d) (2004).

⁴⁰ Petition to Deny at 4.

⁴¹ *See* Opposition, Invoices for Use of Tower and Electricity (Sep. 30, 2005).

⁴² *See* Opposition, Affidavit of Leo Thomasian (Sep. 30, 2005).

14. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.949 of the Commission's Rules, 47 C.F.R. § 1.949, that the licensing staff of the Broadband Division SHALL PROCESS the renewal application filed by Rohel Pascual on April 30, 2001, as amended, (File No. 20010430AAB) in accordance with the instant waiver grant and the Commission's Rules.

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division,
Wireless Telecommunication Bureau